Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-444

In the Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL FREIGHT, INC., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*

On Petition for Writ of Certiorari
to the Temporary Emergency Court of Appeals
of the United States

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

*Philip P. Kalodner
900 Bourse Building
Independence Mall
Philadelphia, PA 19106
(215) 592-8788

Attorney for Petitioners

DATED: January 8, 1986

**Counsel of Record*

SMITH-EDWARDS-DUNLAP COMPANY, 2867 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 425-8800

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

REPLY AND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI 1

I. The Merits of the Petition Seeking Remand on the Remedy Issue Fully Justify Reversal 1

II. The Remedy Determination Is of Precedential Significance 5

CONCLUSION 6

APPENDIX J

Proposed Legislation, Pennsylvania C-1

APPENDIX K

Portions of the April 1, 1985 Report of the Office of Hearings and Appeals, Department of Energy C-9

APPENDIX L

Excerpt from Memorandum of Petitioners in Support of Motion for Intervention C-25

TABLE OF AUTHORITIES

Page

Comptroller General's Report B-214953 GAO/RCED 85-46 (Feb. 14, 1985) 4

Office of Hearings and Appeals, DOE Report to the U.S. Dist. Ct., Kansas: In re Department of Energy Stripper Well Exemption Litigation, MDL 378 4

Pub. L. No. 97-377 §155, 96 Stat. 1830, 1919 (Warner Amendment) ..... *passim*

Proposed Senate Bill No. 1277, Pennsylvania 4

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-444

NATIONAL FREIGHT, INC., *et al.*,

*Petitioners**

v.

UNITED STATES OF AMERICA, *et al.*

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The purpose of this Memorandum is both to reply to the Briefs in Opposition filed by the United States and State Respondents, and to supplement the Petition by calling the Court's attention to recent developments bearing on the grant of certiorari.

I. THE MERITS OF THE PETITION SEEKING REMAND ON THE REMEDY ISSUE FULLY JUSTIFY REVERSAL

The Oppositions rely upon misrepresentation of the record (i) as to the nature of the remedy as to which review is sought, (ii) as to the possibility of accomplishing the statutory goal of restitution, and (iii) as to the procedural context in

*There are no parent companies, subsidiaries other than wholly owned subsidiaries, or affiliates of either RJG Cab Inc. or National Freight, Inc.

which Petitioners and others were denied their due process procedural rights.

1. The remedy was not to use the funds "in a manner that will help to undo the damage caused by the regulatory violations in this case" (Brief for the United States in Opposition, at 34). It was, instead, to help a small segment of the population, the poor, who heat with natural gas, to pay home heating bills. (As noted in the Petition, natural gas is not derived from the oil as to which the overcharge funds relate, Petition at 8). So the District Court, at least, acknowledged by explaining that the selected programs operate to "relieve consumers of some of the burden of towering oil costs . . . either by reducing overall consumption through conservation or by *direct financial assistance to those most in need.*" (Appendix in No. 85-432 at A-274, emphasis supplied). In opting for a program to benefit the poor, the District Court was indeed respecting "the wisdom of the solution chosen by Congress" in appropriating $200 million of overcharge refunds in the Warner Amendment, §155, Pub. L. 97-377, 96 Stat. 1830, 1919 (1982), and determining to "adopt it as the most appropriate equitable remedy in the circumstances of this case." (Appendix in No. 85-432 at A-274). No one can read the Congressional debate on the Warner Amendment and have any doubt that its motivation and purpose was to provide funds to assist the poor in payment of home heating bills rapidly increasing by virtue of increases in the prices of natural gas in the winter of 1982. And, if any confirmation be needed of the intent of Congress, it is provided by the fact that the program to assist the poor in payment of utility bills is the dominant program of the five named by Congress in the Warner Amendment, and by the District Court here as the programs for which the funds could be spent. (For the appropriate Congressional record references and computations, see Petition in No. 85-444 at 7-9).

2. An effort to accomplish restitution to those injured by the Exxon overcharges does not involve an inquiry process which is either "wasteful" or "ultimately futile" (United States Opposition at 34). The proof of that pudding is that the De-

partment of Energy's Office of Hearings and Appeals has largely completed such an inquiry in connection with similar crude oil overcharges, and has concluded that restitution is possible. (See discussion below at 4).

3. Finally, the argument that Petitioners are not entitled to their right to restitution because they "intervened only very late in the day in the district court and offered little support there for the contentions that they now press" (United States Opposition at 27) ignores the critical facts that (i) the District Court misled prospective intervenors by promising to defer consideration of remedy, and then failed to do so, and (ii) the limitation of the right of Petitioners to participation in the Appeal was the Court's idea, not Petitioners'. (See Petition in No. 85-444 at 22-23).

Two recent developments demonstrate anew both the extent to which the remedy selected will divert the funds from the statutory goal of restitution, and the possibility of accomplishing that statutory goal:

A. Legislation introduced in Pennsylvania, the home state of Petitioners RJG Cab Inc. and Geraldine H. Sweeney, to appropriate the funds to be received in this case provides that 75% of the funds are to be expended to benefit poor persons, with 25% to be expended for other conservation projects. (Appendix J). A report of the Comptroller General as to the planned use of the Warner Amendment funds indicated that Pennsylvania intended only to spend approximately 45% of the funds received for assistance to the poor. (Report of the Comptroller General B-214953, GAO/RCED 85-46 dated February 14, 1985)*. In its plans for Warner Amendment expenditures Pennsylvania was fairly typical of the ten states studied by the Comptroller General, who, on average, planned to expend some 40% of the funds received for the poor. The increase in percentage to be spent for the poor in the case of a fund here which is approximately 10 times the fund available through the Warner Amendment is to be expected by virtue of the inherent limitations in the amounts which can be ex-

---

*A copy of the Report has been lodged with the Clerk.

pended for the non-poor programs; another indication of the same phenomenon is that Congress has now deleted for current funding two of the five programs, and that two of the three remaining programs involve assistance to the poor. (Petition, at 8) Thus, it is clear that the Congressional intent in adopting the Warner Amendment to benefit the poor and the District Court's acknowledgement in the instant case that its remedy would emphasize "direct financial assistance to those most in need" will indeed be implemented, even to a greater extent than in the case of the Warner Amendment funds, should the remedy determination here remain undisturbed.

B. The only tribunal which has heard evidence on the possibility of developing a restitution plan as to crude oil overcharges as are here involved, the Office of Hearings and Appeals of the Department of Energy (OHA) has (i) specifically rejected the argument that it is impossible, the basis of the determination by the District Court not to try and (ii) has indeed recommended and outlined a plan of restitution. The Petition for Certiorari filed in No. 85-432 argued inferentially from the publicly filed OHA report of June 21, 1985. However, what Petitioners did not then know, but what is now revealed, is that OHA specifically so determined in its initial report of April 1, 1985, and that the deletion of such specific findings was after consultation with senior DOE officials who desired to divert crude oil overcharge refunds to the U.S. Treasury, either to relieve a specific demand upon the Treasury, as in connection with funding for assistance to the poor for home heating oil costs, or to reduce the federal deficit. (The two principal sections of the first OHA report which were deleted prior to the filing of the report of June 21, 1985 which is reprinted in the Appendix in 85-432 at A-329 et seq., are set forth in Appendix K hereto. The full text of the April 1 Report has been lodged with the Clerk by petitioners in No. 85-430.)

The United States attempts to bolster its argument of "impossibility" by asserting that "it was admitted by many of the parties below that any attempt to trace the overcharges would be impossible." United States Opposition, footnote 29 at

29. Since, as OHA found after hearing the evidence, "a precise tracing ... through an individual refiner's operations would not be probative of the question before us" of the injury absorbed at the various distribution levels (Appendix in No. 85-432 at A-339-340), whether tracing is possible is of no significance. The language quoted by the United States from the Motion to Intervene filed by these Petitioners is blatantly out of context. The portion of the memorandum in which the quotation occurs is set forth in Appendix L hereto.

II. THE REMEDY DETERMINATION IS OF PRECEDENTIAL SIGNIFICANCE

The United States argues that the remedy determination is of no precedential significance because of the "factbound nature of the decision below" and "the procedural circumstances in which it was made". (United States Opposition at 28) The argument misses the points made in the instant Petition for Certiorari:

1. The District Court's acknowledged intent of assisting the poor, as Congress had also intended in connection with the Warner Amendment, establishes the precedent that a court faced with the equitable duty of restitution may either (i) determine its own social priority and use the funds accordingly, or (ii) defer to Congress in the determination of a judicial remedy. The precedent of judicial social legislation threatens to substitute the social philosophy of a judge for the rule of law, and the precedent of deference to Congress encourages Legislative interference with the Judicial power in violation of the Constitutional principle of separation of powers.

2. The District Court's denial of the right of Petitioners to participate, by deferring intervention on the promise that the remedy issue would be deferred and then determining remedy without notice, creates a precedent for the denial of effective intervention to those entitled to intervene as a matter of right. Evidently, even the Solicitor General is concerned about such a precedent. He makes a point of arguing at length

that those entitled to restitution have no right to intervene, but bases his argument on a determination that it is impossible to develop a restitution plan. (United States Opposition at 32-33) As already noted, the deficiency in this argument is that the District Court here did not try to develop a restitution plan, assuming in advance that it was impossible, and the only tribunal that did try, OHA, concluded that it was possible.

CONCLUSION

The Petition for Certiorari should be granted as to the issue of remedy. The merits justify reversal and the remedy decision below is of precedential significance.

Respectfully submitted,

PHILIP P. KALODNER*
900 Bourse Building
Independence Mall
Philadelphia, PA 19106
(215) 592-8788

DATED: January 8, 1986

**Counsel of Record* *Attorney for Petitioners*

APPENDIX J

Printer's No. 1712

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

NO. 1277
Session of 1985

INTRODUCED BY STAUFFER, JUBELIRER, LOEPER, MOORE, REIBMAN, HESS, ZEMPRELLI, BRIGHTBILL, SHUMAKER, KRATZER, ROCKS, STAPLETON, LEWIS, FUMO, LINCOLN, JONES, SINGEL, ROMANELLI, MELLOW, BODACK, EARLY, HANKINS, ANDREZESKI AND O'PAKE, DECEMBER 17, 1985

REFERRED TO APPROPRIATIONS, DECEMBER 17, 1985

AN ACT

Establishing a special fund for moneys received by the Commonwealth as a result of oil overcharge settlements; designating certain low income energy conservation and assistance programs for funding from this special fund; and making appropriations.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short title.

This act shall be known and may be cited as the Energy Conservation and Assistance Act.

Section 2. Legislative findings.

The General Assembly hereby finds and declares that:

(1) There are and will be funds available to the Commonwealth due to settlements of litigation and administrative proceedings brought by the United States Department of Energy against oil companies and refineries for alleged violations of the Federal Petroleum Price Allocation Regulations.

(2) In accordance with the settlements, there moneys are to be distributed to the states for specific energy conservation and assistance programs.

(3) In recognition of the economic plight of low income persons in this Commonwealth, the high and rising costs of energy, and the substantial reduction in energy consumption which is known to result from effective weatherization, the General Assembly considers it sound public policy to provide additional funding for weatherization for low income persons, energy assistance for low income persons, and other conservation programs as specified in this act, and further declares that oil overcharge funds shall be utilized to pay the costs of such programs.

Section 3. Definitions.

The following words and phrases when used in this act

shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Energy conservation and assistance programs." Includes any of the following:

(1) The programs established under Part A of the Energy Conservation in Existing Buildings Act of 1976 (Public Law 94-385, 42 U.S.C. §6861 et seq.), establishing the Low Income Weatherization Program.

(2) The programs established under Part D of Title III of the Energy Policy and Conservation Act (Public Law 94-163, 42 U.S.C. §6321 et seq.), providing for state energy conservation programs.

(3) The programs established under Part G of Title III of the Energy Policy and Conservation Act, providing for energy conservation investments in schools and hospitals.

(4) The programs established under the National Energy Extension Service Act (Public Law 95-39, 42 U.S.C. §7001 et seq.), providing for, inter alia, Energy Conservation Outreach Programs to small businesses and individual consumers.

(5) The programs established under the Low Income Home Energy Assistance Act of 1981 (Public Law 97-35, 42 U.S.C. §8621 et seq.), providing for energy assistance to low income households.

"Fund." The Energy Conservation and Assistance Fund established in section 4.

"Household." Any individual or group of individuals who are living together as one economic unit and whose residential energy is customarily purchased in common or who make undesignated payments for energy as part of a rental payment. A roomer and boarder who is related to any member of the applicant household is considered to be a member of the household.

Section 4. Establishment of special fund.

There is hereby created an Energy Conservation and

Assistance Fund. All funds made available to the Commonwealth after December 1, 1985, due to settlements of litigation or administrative proceedings brought by the United States Department of Energy against oil companies and refineries for alleged violations of the Federal Petroleum Price Allocation Regulations shall be credited by the Treasury Department to this fund. Interest earned by investment of moneys in this fund by the Treasury Department shall also be credited by the Treasury Department to this fund.

Section 5. Supplemental low income energy conservation and assistance programs.

(a) Establishment of programs.—The following supplemental low income energy conservation and assistance programs are hereby established:

(1) Pennsylvania Supplemental Low Income Weatherization Program. This program shall supplement the programs set forth in paragraph (1) of the definition of "energy conservation and assistance programs" in section 3.

(2) Pennsylvania Supplemental Low Income Energy Assistance Program. This program shall supplement the programs set forth in paragraph (5) of the definition of "energy conservation and assistance programs" in section 3.

(b) Eligibility requirements.—Households applying for benefits under the programs established in subsection (a) shall meet the following eligibility requirements:

(1) Households to be eligible will be those dwelling units which are occupied by persons with annual income at or below 150% of the Federal Poverty Guidelines or contain a member who has, during the past 12 months, received cash assistance under Title IV or XVI of the Social Security Act (Public Law 74-271, 42 U.S.C. §§601-662) and section 2605(b)(2) of the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35, 95 Stat. 357).

(2) In addition to the income eligibility requirements specified in paragraph (1), households applying for benefits under this act shall meet the eligibility requirements for energy assistance as provided for by the Omnibus Budget Reconciliation Act of 1981, pursuant to the authority of section 201(2) of the act of June 13, 1967 (P.L.31, No.21), known as the Public Welfare Code.

(c) Administration of programs.—The programs established in subsection (a) shall be administered as follows:

(1) The Pennsylvania Supplemental Low Income Weatherization Program established in subsection (a)(1) shall be administered by the Department of Community Affairs in a manner consistent with Part A of the Energy Conservation in Existing Buildings Act of 1976 (Public Law 94-385, 42 U.S.C. §6861 et seq.). Community action agencies, existing low-income weatherization providers or, other county, municipal or nonprofit corporations may apply for a portion of these funds. The Department of Community Affairs may establish regulations necessary for administering this program.

(2) The Pennsylvania Supplemental Low Income Energy Assistance Program established in subsection (a)(2) shall be administered by the Department of Public Welfare in a manner consistent with the program authorized under the Low Income Energy Assistance Act of 1981 (Public Law 97-35, 42 U.S.C. §8621 et seq.). The Department of Public Welfare may establish regulations necessary for administering this program.

Section 6. Administration of certain energy conservation and assistance programs.

The energy conservation and assistance programs set forth in paragraphs (2), (3) and (4) of the definition of "energy conservation and assistance programs" in section 3 shall be administered by the Governor's Energy Council. The council may establish regulations necessary for administering these programs.

Section 7. Administrative costs.

No more than 10% of the annual appropriation for each of the energy conservation and assistance programs, including the supplemental programs established in section 5, shall be used for the planning and administrative costs of these programs.

Section 8. Annual report and audit.

The Department of Community Affairs, the Department of Public Welfare and the Governor's Energy Council shall each provide the General Assembly with an annual report, which shall include an independent audit, on or before September 15 of each year, covering all expenditures made in administering their respective programs pursuant to this act.

Section 9. Allocation of annual appropriations.

(a) General rule.—Appropriations from the fund shall be made only for the energy conservation and assistance programs, including the supplemental programs established in section 5, set forth in this act.

(b) Restriction.—At least 75% of the annual appropriations made from the fund shall be for the supplemental programs established in section 5.

Section 10. Appropriations.

(a) Department of Community Affairs.—The sum of $10,000,000, or as much thereof as may be necessary, is hereby appropriated from the fund to the Department of Community Affairs for the fiscal year July 1, 1985, to June 30, 1986, for the purposes set forth in this act.

(b) Department of Public Welfare.—The sum of $10,000,000, or as much thereof as may be necessary, is hereby appropriated from the fund to the Department of Public Welfare for the fiscal year July 1, 1985, to June 30, 1986, for the purposes set forth in this act.

(c) Governor's Energy Council.—The sum of $5,000,000, or as much thereof as may be necessary, is hereby appropri-

ated from the fund to the Governor's Energy Council for the fiscal year July 1, 1985, to June 30, 1986, for the purposes set forth in this act.

(d) Lapse.—Any funds unexpended, uncommitted and unencumbered as of June 30, 1986, shall lapse and shall be available for appropriation from the fund for future fiscal years.

Section 11. Effective date.

This act shall take effect immediately.

APPENDIX K

(Following is a copy of the cover page of the April 1, 1985 OHA Report and excerpts. The full text has been lodged with the Clerk by Petitioners in 85-430.)

draft

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

In re Department of Energy	)	
Stripper Well	)	No. MDL 378
Exemption Litigation	)	

Report of the

Office of Hearings and Appeals

of the Department of Energy

V. STANDARDS FOR THE FACT-FINDING PROCESS

An important group of threshold issues concerns the nature of the burden of persuasion and the other, related evidentiary standards that should govern the fact-finding mission referred by the court. These issues are discussed below.

At the outset, we need to reiterate the reasons why the fact-finding process can only measure the impact of the MDL 378 overcharges on the domestic refining industry as a whole, rather than trace their effect on individual firms. This issue arises because the only credible evidence regarding the impact of the overcharges on refiners consists of econometric estimates which measure indirectly the impact of the overcharges on the entire refining industry. Nevertheless, the states have argued in their consolidated brief that the referral order precludes OHA from utilizing evidence of that nature. The states maintain that OHA should require clear and convincing evidence of injury in order to find that any particular refiner bore some impact of the overcharges. This standard is advocated by the states because it would require a precise tracing of the impact of the overcharges—something which they believe cannot be done in a way that will yield economically valid information. If we were to accept the "heads I win—tails your lose" evidentiary conundrum posited by the states, we would have to conclude that it was impossible to determine who was injured by the overcharges. As explained below, we believe that the position espoused by the states is without merit.

Because of the operation of the Entitlements Program, the MDL 378 overcharges caused a small increase in the price of all crude oil refined in the United States. This general increase in crude oil costs raised market price levels for refined products by some amount. By measuring the amount of the crude oil cost increase caused by the overcharges that refiners were able to pass through in the form of product price increases, we can estimate the impact of the overcharges on the refining sector as a whole. By contrast, any attempt to

trace the impact of the overcharges through an individual refiner's operations would ignore the general increase in market prices for refined products caused by the overcharges, and therefore would not measure the amount of the overcharges which that refiner was able to pass through as market prices for products rose. In economic terms, tracing the overcharges through an individual refiner's operations would produce invalid results because of a failure to hold all other factors constant. "Holding all other factors constant" is a fundamental requirement of marginal economic analysis. Since this type of individualized "tracing" exercise would not yield any economically valid information, *see, e.g.*, Doc. No. 190, vol. I, sections III and V, it is disingenuous of the states to urge an evidentiary standard which would require it. Not only is an individualized tracing of the cost increases caused by the overcharges impossible, it is clearly not required in the present restitutionary context.

As a basic premise, restitution is never an exact science. *See S.O.S. Gasoline v. DOE*, Fed. Energy Guidelines (Court Decisions 1981-1984) ¶26,321 (D.D.C. 1981). The essential function of restitution is "to make the victims whole, 'so far as possible, and restored to a position where they would have been had it not been for' the unlawful violation . . ." *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d at 722. In complex antitrust cases involving the law of damages, with requirements considerably more exacting than those pertaining to restitution, the Supreme Court has consistently recognized that wrongs should not go unremedied simply because there is no mathematically precise measure of damages. For example, in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931), the Court stated: "it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." 282 U.S. at 563. In another vein, the Temporary Emergency Court of Appeals has noted that "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations . . ." *General Crude Oil Co. v. DOE*, 585 F.2d 508, 516 (Temp. Emer. Ct. App. 1978), *cert.*

denied, 440 U.S. 912 (1979), *quoting Amtel, Inc. v. FEA*, 536 F.2d 1378, 1383 (Temp. Emer. Ct. App. 1976), *quoting Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Since the government has a duty to ascertain those injured, and make refunds to them, with interest, from the restitutionary funds, *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d at 723, it would be wrong to ignore that duty, simply because the present case does not lend itself to absolutely precise calculations. *See also Cities Service Co.*, 5 FEA ¶80,627 (1977); *Skelly Oil Co.*, 3 FEA ¶80,603 (1976). Based on the foregoing, we have determined that in cases such as the instant one, the use of approximations regarding the impact of the overcharges is not only permissible—it is clearly required.

Having explained why we must consider approximations in our fact-finding mission, we will now discuss the standard by which the evidence should be evaluated. All participants except the states have suggested that the OHA apply a preponderance of the evidence standard in determining who bore the impact of the overcharges and in what amounts. The states have urged that a clear and convincing evidence standard should be required. For the reasons set forth below, the standard by which we have judged whether a proponent of a particular theory met its burden of persuasion is the standard typically used in civil litigation—a preponderance of the evidence test.

To determine the evidentiary standard that should be used in this proceeding, we first look to whether the Congress has prescribed the degree of proof that must be adduced by a proponent of a factual finding to carry its burden of persuasion in this administrative proceeding. *See generally Steadman v. SEC*, 450 U.S. 91 (1981); *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984). The parties have not cited us any such provision, and our review of the Emergency Petroleum Allocation Act of 1973 and the Economic Stabilization Act of 1970 does not disclose such a prescription in either of those statutes.

Where Congress has not mandated a standard of proof for an administrative proceeding, it is well settled that the judici-

ary is the traditional and most appropriate forum to prescribe the standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983). Our review of decisions by the Temporary Emergency Court of Appeals has disclosed no case in which that court has established such a standard, and none has been cited by any of the parties. Accordingly, the inquiry next turns to the referral order of the District Court for guidance. Some participants in this proceeding argue that the District Court intended that the fact-finder apply a preponderance of the evidence standard, while others assert that the referral order imposes a higher standard. *Compare* Doc. No. 230 *with* Doc. No. 233. Certain parties insist that the court imposed a higher standrd because of its direction that the OHA fact-finding attempt to determine who bore the impact of the overcharges "with particularity." *E.g.*, Doc. No. 231. We believe that the referral order did not impose a higher standard and that the traditional preponderance of the evidence standard should be applied in this case.

The traditional standard of evidence utilized in a civil or administrative proceeding is proof by a preponderance of the evidence. *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240 (D.C. Cir.), *cert. denied*, 449 U.S. 834 (1980). That standard must be applied unless the type of case and the sanctions or hardship imposed require a higher standard. *Woodby v. INS*, 385 U.S. 276 (1966). This is so because a standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983), *quoting Addington v. Texas*, 441 U.S. 418, 423 (1979). A preponderance of the evidence standard allows both parties to "share the risk of error in roughly equal fashion." *Addington v. Texas*, 441 U.S. at 423. Any other standard, such as the one urged by the states, expresses a preference for one side's interests. Where particularly important individual interests or rights are at stake, the Supreme Court has required proof by clear and convincing evidence rather than by the preponderance of the evidence. *Herman & MacLean v. Huddleston*, 459 U.S. at 389. *See also Santosky v. Kramer*, 455 U.S. 745

(1982) (proceeding to terminate parental rights); *Addington v. Texas*, 441 U.S. 418 (1979) (involuntary commitment proceeding); *Woodby v. INS*, 385 U.S. 276 1966) (deportation). However, nothing in the referral order leads us to conclude that this is the type of case that requires a more stringent burden of persuasion on the proponents of the competing theories than proof by a preponderance of the evidence.

In summary, we have determined that we must consider approximations regarding who bore the impact of the overcharges at issue in this proceeding and in what amounts. We will utilize a preponderance of the evidence test in evaluating the evidence presented by the parties and in determining whether the proponents of the many competing theories have met their burden of persuasion in the case.

— — — — — — — — — —

VIII. RECOMMENDATION OF RESTITUTIONARY MECHANISM

In its September 13 referral order, this court stated that it "will also welcome the views of the OHA on how restitution can best be achieved in this case. The Court, however, is retaining jurisdiction over both this action and the escrow fund. No determination of restitution nor payout from the escrow fund may be ordered by the OHA, as such matters remain within the province of this Court." Referral Decision at 596-97. The following sections present a restitutionary mechanism to implement the factual findings contained in this determination which we believe is administratively workable. The mechanism provides for the processing of refund applications filed by direct purchasers of MDL 378 crude oil, Entitlements Program participants, and consumers of refined petroleum products that purchased those products directly from refiners. These applications can be accepted promptly upon announcement of a payment proceeding. We recognize that this undertaking will require the dedication of significant resources. If directed by this court, the Office of Hearings and Appeals is ready to assist in this endeavor.

Unlike the fact-finding contained in this report, which is based upon the record compiled in this proceeding, the recommended restitutionary mechanism reflects DOE policy. Accordingly, it is the intention of the OHA to follow similar procedures in distributing crude oil moneys which are subject to Subpart V special refund proceedings. 10 C.F.R. Part 205, Subpart V.

A. Direct Purchasers

Direct purchasers of the crude oil subject to this proceeding who claim injury due to undercompensation by the Entitlements Program should be permitted to file refund applications. Each application should include the following information for each crude oil property from which the applicant requests a refund:

1. A schedule showing on a monthly basis the number of barrels purchased, the price actually paid per barrel, the lawful tier level or levels for that crude oil, and the lawful ceiling price for each of those tiers;

2. Copies of published postings which indicate the market price levels for the crude oil involved;

3. All facts known to the applicant relating to deposits into the escrow account as a result of the miscertifications involved;

4. A schedule showing, on a monthly basis, aggregate banks of unrecouped cost increases calculated pursuant to the DOE regulations; and

5. The name, address, and telephone number of a person who may be contacted if further information is necessary for processing the refund application.

These applications should be analyzed on a case-by-case basis to determine whether the individual applicants actually were injured by the amount of the undercompensation. Substantial concerns have been raised in this area. For example, it has been suggested that some of the MDL 378 transactions reported by direct purchasers may not have occurred at arm's length, and that other forms of compensation were received

that obviated any apparent injury. *See* Tr. at 41-45, 56, 64-65, 116-17.

In addition, no claimant should receive a refund unless it demonstrates that it paid the correct amount into escrow. Counsel for the group of refiners denominated Arco et al. in this proceeding indicated at oral argument that he believes that firms who are parties to this litigation should not receive refunds unless they show that they have deposited the proper amount into the escrow account:

> [Q]: In the contest of a refund claims process should a claimant who is a producer refiner be required to demonstrate that it has deposited all of the funds it should have into escrow prior to getting any refund?
>
> MR. KENNEDY: Certainly. I can't imagine that one would be unwilling to do so but I don't think there is any question but [that] sooner or later, that all of the funds that arose because of the overcharge will be in escrow.

Transcript of October 30, 1984 Oral Argument at 95-96. We agree. Each refund claimant should be required to demonstrate that it has deposited all of the funds it should have into escrow before it is eligible to receive a refund.

B. Refiners

Refiners should also be permitted to file refund applications. The portion of the escrowed funds not paid to direct purchasers should be deemed to have been passed on to participants in the Entitlements Program. Of that amount, four percent should be set aside in a pool to satisfy claims from refiners.

The pool set aside to satisfy claims from refiners should be used first to fund unsatisfied entitlements exception orders, and the remainder should be distributed pro rata to refiners. *See* 50 Fed. Reg. 1919 (1985). The payment of outstanding unsatisfied exception relief orders is an important feature of the restitutionary mechanism which the OHA is recommending to this court, and it merits further explanation.

Exception relief was intended to mitigate adverse effects of the DOE regulations suffered by individual firms where the application of those regulations to the particular circumstances of the firm resulted in a "special hardship, inequity or unfair distribution of burdens." Department of Energy Organization Act, 42 U.S.C. §7194(a) (1982). In many instances, exception relief was effectuated by orders reducing a firm's obligation to buy entitlements or permitting it to sell entitlements to the extent necessary to alleviate the hardship caused by the DOE regulations. These orders were often based upon projected financial results, and if a later review revealed a firm had received more or less than the relief necessary to offset the hardship, an order was issued requiring the firm to purchase or sell additional entitlements.

On January 28, 1981, the President eliminated federal regulation of crude oil and petroleum products. Exec. Order No. 12287, 46 Fed. Reg. 9909 (1981). At the time of decontrol, a number of entitlements exception orders were outstanding, and the OHA continued to issue entitlements exception orders after decontrol. On June 28, 1984, the ERA issued a final decision not to publish any further entitlements lists. 49 Fed. Reg. 27410 (1984). Accordingly, the question remained as to whether and how to effectuate entitlements exception orders.

On January 9, 1985, the Administrator of the DOE's Economic Regulatory Administration (ERA), exercising authority delegated to him by the Secretary of Energy, announced a final decision concerning the Department's policy on entitlements exception orders (the January 9 notice). 50 Fed. Reg. 1919 (1985). The January 9 notice stated the Department's policy that: "if OHA determines refiners as a class were injured by violations or alleged violations of the EPAA regulations, then OHA should fund receive orders from that portion of refund money which corresponds to the injury sustained by refiners as a class." 50 Fed. Reg. at 1921 (footnote omitted). The notice explained the reason for this policy as follows:

> Receive orders resulted from individual adjudica-

tions which held that the EPAA regulations imposed special hardship on individual firms during the period of controls. Section 504 of the DOE Act imposes an obligation on DOE to provide adjustments to the EPAA regulations as necessary to prevent such hardship. Even though the EPAA regulations, including the Entitlements Program, have terminated, DOE believes fairness requires an attempt to use another means of granting relief to firms with adjudicated hardship.

In the event that OHA, based on evidence presented to it, determines that a portion of refund money corresponds to the inury sustained by refiners as a class, existing exception and remedial authority will enable it to carry out the policy decision announced in this Notice and fund receive orders from that portion of refund money. Invoking OHA's exception and remedial authority to distribute refund money to firms with receive orders would further the purposes of the EPAA since the money would be targeted to firms which received an adjudication that they suffered special hardship under the regulations. Such a distribution would remove any remnants of this hardship to individual firms caused by EPAA regulations. In particular, the policy decision set forth in this Notice is of special significance to small and independent refiners because over three-fourths of the amount of relief provided in all the specific adjudications resulting in receive orders is directed to small and independent refiners. In this respect, this policy decision furthers the statutory objectives of the EPAA, because small and independent refiners are a class specified in that statute for special protection.

Use of this refund money would be entirely consistent with the effects of receive orders issued during the period of the period of controls and the operation of the Entitlements Program. During that time refiners as a class funded receive orders because the Entitlements relief directed to recipients of exception orders simply increased pro rata the burden borne by all refiners in the

> Entitlements Program. Under the policy decision announced in this Notice refiners as a class again will, in effect, fund receive orders from the refund money associated with overcharges actually borne by refiners as a class.

50 Fed. Reg. at 1921-22 (footnote omitted). Under this policy, the moneys available to refiners should be used first to satisfy outstanding orders adjudicating requests for exception relief which resulted in a firm being permitted to sell additional entitlements.

Funds remaining after all such orders are paid should be distributed to all refiners on a pro rata basis. The pro rata share of runs to stills of each refiner could be calculated for the entire existence of the Entitlements Program, i.e., for the period November 1974 through January 1981. However, because 82 percent of the MDL 378 overcharges occurred during the period 1978 through 1980, Doc. No. 190, at 200, a better method of restitution would utilize this information for the years 1978, 1979, and 1980. A refiner-participant would file data showing its monthly runs to stills as reported to the Entitlements Program and calculate its pro rata share of the program. In addition, it would need to file information showing that it maintained "banks" under the refiner price rule in excess of the claimed refund. A showing of cost banks would be sufficient at this point in the refund process because the initial finding of injury to refiners as a class has already been made, and we need look no further. Payment could then be made promptly.

A number of Entitlements Program participants were firms other than petroleum refiners. For those participants, including public utilities, municipalities, and cooperatives, passthrough questions are not relevant. Unlike refiner-participants, these Entitlements Program participants generally operate in a manner designed to passthrough the benefits associated with any refund to their customers or constituents. For public utilities, the increase in crude oil costs, and decrease in residual fuel oil based entitlements benefits, associated with

the dispersal of the impact of MDL 378 overcharges through the Entitlements Program was passed on to customers, either in rate bases or through fuel adjustment clauses. *See, e.g.*, Doc. No. 199. These firms should be granted full refunds provided they demonstrate that the refund will be passed on to their customers. Municipalities who participated in the Entitlements Program should receive refunds without any further showing. Farmer cooperatives which participated in the Entitlements Program should receive refunds based upon their pro rata share of runs to stills times the percentage of product sold to members. As we have stated in Subpart V refund proceedings, in general,

> under the by-laws and contractual agreements that control the financial practices of coops, any overcharges would have been channeled to their customers, who for the most part are its member-owners. Similarly, any refund would be passed on to the current member-owners of the coop. In effect, we have treated refund applications by coops as applications made on behalf of their customers.

Standard Oil Company (Indiana)/Farmland Industries, Inc., 12 DOE ¶85,153 at 88,472 (1984).

C. Purchasers of Petroleum Products

Finally, there are three classes of individuals and firms who also were affected by the MDL 378 overcharges. There are (1) resellers of petroleum products, (2) consumers of petroleum products who purchased product from a reseller, and (3) consumers who purchased product from a refiner. With respect to resellers, we propose to hold an additional hearing at which time members of that class can demonstrate that they were injured. That hearing will also concern the impact absorbed by consumers who purchased product from a reseller. We have purposely not convened that hearing until after the issuance of this determination.

For consumers of petroleum products who purchased directly from a refiner, including airlines, public utilities, the

federal government, and other large purchasers that used petroleum products in their businesses, the finding in this determination that refiners absorbed four percent of the impact of the MDL 378 overcharges means that the rest of the MDL 378 overcharges were passed through, and those consumers absorbed the remainder, or 96 percent of that impact. Consequently, any refund mechanism adopted as a result of this fact-finding should permit consumers that purchased directly from refiners to file refund claims immediately.

We believe that the following methodology for paying claims by those consumers is workable. First, a volumetric refund amount should be determined. According to information supplied to us by the Energy Information Administration, during the period of federal controls on crude oil Americans consumed 2,020,997,335,000 gallons of refined petroleum products. 48 Fed. Reg. 57608 (1983). Of that amount, 834,197,280,000 gallons were consumed during the years 1978, 1979, and 1980. The per gallon amount should be calculated by dividing 96 percent of the amount available for distribution by the number of gallons of refined petroleum products sold during those three years. As noted previously, the record indicates that 82 percent of the MDL 378 overcharges occurred during the period 1978 through 1980. Doc. No. 190, at 200. Thus, the use of these three years, as opposed to the entire period, would more accurately distribute the funds to those who were injured. It would also be efficient and administratively workable since it would obviate the need to document purchases made more than seven years ago and expedite the analysis of claims. For example, if $900 million were available for distribution after direct purchasers were paid, this formula would yield a per gallon refund amount of approximately one-tenth of a cent. Consumers that file refund claims would need to demonstrate only the total amount of purchases made directly from a refiner during the three-year period 1978 through 1980. Refunds could be calculated simply by multiplying qualifying purchases by $0.001.

Information available to us indicates that under this restitutionary method consumers should receive substantial

refunds. For example, the Air Transport Association of America has indicated that scheduled airlines purchased 33,445,674,000 gallons of kerosene-based jet fuel during the years 1978, 1979, and 1980. Doc. No. 193, at Exh. No. 1. If this restitutionary approach is approved, and the preliminary information supplied by the ATA proves accurate, scheduled airlines should receive refunds from the escrowed MDL 378 overcharges of approximately $33.5 million. Similarly, public utilities purchased approximately 66,332,700,000 gallons of product during the 1978-80 period. EIA, October 1984 Monthly Energy Review at 77 (January 1985). This level of purchases would entitle the utilities to refunds totalling $66.3 million, provided the utilities agree to refund the money to their customers through fuel adjustment clauses.

D. Summary of Recommended Refund Process

In summary, if this court approves this report, refund applications can be accepted from direct purchasers of the MDL 378 crude oil, participants in the Crude Oil Entitlements Program, and consumers that purchased product directly from refiners.

Applications from direct purchasers of the MDL 378 crude oil should be carefully analyzed on a case-by-case basis. Refunds should be granted based upon the difference between the price actually paid and the sum of the lawful ceiling price and the value of an entitlement for that month, times the volume of oil involved, provided that the applicant is able to show it was actually injured by that amount. Prior to receiving a refund, each direct purchaser should be required to demonstrate that it deposited the proper amount into the MDL 378 escrow account.

Refund applications from refiners and consumers who purchased refined petroleum products directly from those firms can also be processed at this time. Refunds to refiners cannot be automatic; the filing of refund applications should be required for several reasons. First, a number of those firms have ceased operations, and an application process would resolve conflicts about the identity of those persons eligible to

receive refunds. Second, a refiner-participant should receive a refund only to the extent it has banks of unrecouped increased costs calculated pursuant to the refiner price rule in excess of the requested refund. A schedule of those banks should be required in any such application. Finally, as noted above, funds available to satisfy these claims should be used first to satisfy any unfunded final entitlements exception orders which would have permitted the firm to sell additional entitlements. A refund application process would allow valid claims of this type to be paid first. Entitlements Program participants who were not refiners are a special case, and they should receive their full pro rata share of the amount of the overcharges passed through to the Entitlements Program.

Refund applications from consumers that purchased refined petroleum products directly from refiners should also be processed. A refund application should include a schedule of purchases during the period January 1, 1978 through December 31, 1980, and an indication from which refiners those purchases were made. It should also include a statement signed by the chief executive officer of the firm verifying that those purchases were made directly from a refiner. Refunds should be distributed based upon a volumetric amount calculated by dividing the amount in this pool by 834,197,280,000. However, in certain circumstances contractual arrangements basing product prices on entitlements benefits could indicate that a refiner or its customer absorbed all of the impact of the MDL 378 overcharges, and in that situation the refiner or the customer should receive an additional amount. The refund process can move forward immediately upon judicial approval, and refund applications can be paid on a partial basis until a final accounting of the escrow account is made.

— — — — — — — — — —

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff	:	CIVIL ACTION NO. 78-1035
EXXON CORPORATION, Defendant	:	
GERALDINE H. SWEENEY Individually and on behalf of all others similarly situated	:	
and	:	
RJG CAB, INC. Individually and on behalf of all others similarly situated	:	
and	:	
NATIONAL FREIGHT, INC. Individually and on behalf of all others similarly situated Plaintiff-Intervenors	:	

MEMORANDUM IN SUPPORT OF MOTION FOR INTERVENTION FOR THE PURPOSE OF APPEAL

I. No Other Party In This Proceeding Will Argue The Petitioner's Position, Nor Any Position Affecting Restitution To The Transportation Users Of More Than Fifty Percent Of Oil Production In The United States; Accordingly, Intervention Is Properly Granted For Purposes Of Appeal

Petitioners believe their participation in the appeal is necessary since only they will argue the position that:

(i) This Honorable Court was correct in finding that the overcharge injury was to ultimate consumers and that the overcharge funds should be returned to them;

(ii) This Honorable Court was also correct in its finding that, as to the injury to such transportation users, it is administratively impracticable to attempt to entertain specific claims based upon specific overcharges to identified customers during the overcharge period;

(iii) This Honorable Court was incorrect however in concluding that the proper remedy was an award of the fund to the States for the purpose of five specific federal programs, none of which benefit users of gasoline and diesel fuel in transportation vehicles; to the contrary, pursuant to the Court's judgment most of the restitution fund will be spent to benefit the limited class of poor persons in connection with heating bills;

(iv) Instead, far more appropriate means are available to return the transportation oil overcharges to the class of those injured, including, inter alia, such measures as reduction of motor vehicle license fees, reduction of motor fuel taxes, and additional expenditures for improvement of roads and bridges.

Inasmuch, therefore, as only these petitioners, will argue the position set forth above, nor indeed any position assuring restitution to the transportation users overcharged by virtue of defendant's actions, it is respectfully requested that they be permitted to intervene.

— — — — — — — — — —